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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

MILLARD V. IRWIN, Owner of the Yacht, "JOMIE",
Petitioner,

versus

EAGLE STAR INSURANCE COMPANY, LTD.,
Respondent.

BRIEF OF RESPONDENT EAGLE STAR INSURANCE COMPANY, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. 1254 (1). The jurisdiction of this Court is questioned since the Petitioner has failed to meet the requirements of Rule 19 of the Supreme Court Rules. The Petitioner has failed to show whether the Court of Appeals in this case has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, has decided a point in question in Federal law which has not been, but should be settled by this Court, or has decided a Federal question in a way in conflict with the applicable decisions of this Court. These were the grounds for jurisdiction set

forth by the Petitioner and he has failed to meet or set forth statutory or case law demonstrating those conflicts.

QUESTIONS PRESENTED

I. Whether this Court should review the decision of the Court of Appeals which considered the decisions of this Court in deciding to apply Florida decisional law under the particular circumstances of this case?

II. Whether this Court should review the decision of the Court of Appeals in light of the fact that the interpretation of the Inchmaree Clause of marine insurance policies has almost uniform interpretation in both the Federal and State courts?

III. Whether this Court should review the decision of the Court of Appeals which reversed the decision of the District Court and remanded the case with directions to dismiss the Complaint when no issues were reserved by the District Court nor were any further issues raised on appeal by the Petitioner?

STATEMENT OF THE CASE

Petitioner, MILLARD V. IRWIN, brings this Petition for Writ of Certiorari to review the judgment and

opinion of the United States Court of Appeals for the Fifth Circuit. That Court, after reviewing the facts and issues of this case and the particular circumstances involved, reversed the judgment of the District Court which had held that the separation of an elbow from the strainer in the water intake system of an air conditioning system caused by deterioration and corrosion due to electrolysis constituted a latent defect, and therefore was within the provisions of the marine insurance policy. The Appellate Court, basing its decision upon a Florida case almost on all fours, held that this condition did not constitute a latent defect.

During the trial of this case, an expert for both parties testified that the cause of the sinking of the vessel was due to the separation of a nipple and/or elbow from the strainer in the water intake of the air conditioning system allowing water to enter the vessel. The separation was caused by deterioration and corrosion of the threading of the steel elbow which had been exposed to a process called electrolysis. The strainer was made of brass while the elbow was made of steel and the combination of these two metals when combined with air and salt water resulted in electrolysis and/or corrosion. The strainer and elbow in question were located at the forward part of the vessel approximately seven to ten inches above the skin of the ship. They were directly below a hatch that is three to three and one-half feet square and approximately three feet above the strainer unit. The trial court ruled that the loss was caused by the use of a steel elbow in the installation of the air conditioning system creating a defect in the machinery of the vessel and that this

defect was a latent defect within the definition included in the latent defect, negligence, risk on shore, etc., clause of the policy. The Court of Appeals reversed and held that the damage was not caused by a latent defect. The Appellate Court did not base their decision on the principle that the trial court's decision was erroneously based on Federal decisional law, but rather that after considering the factors set forth in the *Wilburn* and *Kossick* cases and after weighing the circumstances of the case at hand, they felt that Florida decisional law should be applied especially since the *Egan* case presented a factual situation remarkably similar to the one in this case. The Court nowhere impliedly agreed, as suggested by the Petitioner, that this Florida ruling conflicts with federal interpretations by its own Court on the same issue. In fact, as will be seen in later argument, the principles as set forth in the *Egan* case are consistent with Federal decisional law on the issue of latent defect and the Inchmaree Clause.

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals Was Correct In Deciding To Apply Florida Decisional Law Under The Particular Circumstances Of The Case.

There is nothing express or implied in the decision of the Appellate Court that concedes that the Petitioner would have been entitled to recover under Federal decisional law had it not applied Florida law to this case. The decision of the Appellate Court did say that in

Kossick v. United Fruit Company, 365 U.S. 731, (1961), that the Supreme Court stated that a contract of marine insurance was a maritime contract, but that of itself does not determine whether the interpretation and application of the policy terms are to be governed by state or maritime law. The Appellate Court made clear that "after weighing the circumstances of this case in the light of the factors controlling the decision in *Kossick, supra*, we conclude that Florida law should be applied. Unlike the oral contract in *Kossick*, the insurance contract before us in this case is one in which Florida has substantial and legitimate interest. The Plaintiff is a Florida resident and the yacht, "Jomie" was anchored in Florida waters when she sank. The marine insurance contract was brokered in Florida and the defendant-appellant insurance company is authorized to do business in that state. The Plaintiff is no itinerate seaman of the class traditionally protected by the Federal Maritime Jurisprudence."

The Appellate Court was correct in applying Florida decisional law in this case due to the almost complete similarity in the circumstances involved in both the case of *Egan v. Washington General Insurance Corp.*, 240 So.2d 875 (4 DCA 1970) and that of the case at hand. In *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310 (1955), the court stated that "since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction." But the court goes on to state that "it does not follow, as the courts below seem to think, that every term in every maritime contract can only be controlled by some fed-

erally defined admiralty rule. In the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States." The Court also cites the historical significance of the marine insurance industry's regulation by the states and the federal government's tendency to acquiesce in that trend. In fact, the court stated that "We, like Congress, leave the regulation of the marine insurance where it has been — with the States." In the concurring opinion, Justice Frankfurter stated that "our problem is whether this situation — involving a marine policy such as is the basis of litigation — calls for a uniform rule throughout the country applicable to breaches of warranty of all similar marine insurance contracts." This particular issue has been raised by the Petitioner in his brief with regard to the interpretation and application of the Inchmaree Clause of marine hull insurance policies. Justice Frankfurter stressed in his concurring opinion that there are times when uniformity of application of law revocable to various policies overrides the historical trend toward state regulation. "Is it to be assumed that were the Queen Mary, on a world pleasure cruise, to touch at New York City, New Orleans and Galveston, a Lloyds policy covering the voyage would be subjected to the varying insurance laws of New York, Louisiana and Texas?" Judge Frankfurter goes on to say that "the business of marine insurance often may be so related to the success of many manifestations of commercial maritime endeavor as to demand application of a uniform rule of law designed to eliminate vagaries of state law and to keep harmony with the marine insurance laws of other great maritime powers." This would seem

to be the reasoning of the Fifth Circuit Court of Appeals in the *Sea Pak* case when not only was the ship not docked in Florida, but was operating in the Bahamas area on a fishing expedition and only returned to the Florida coast on occasions for repair. *Tropical Marine Products v. Birmingham Fire etc.*, 247 F.2d 116 (5th Cir. 1957). But Justice Frankfurter goes on to say in the *Wilburn* case, *supra*, "As it is true of other maritime interests, however, the demand for uniformity is not inflexible and does not preclude the balancing of the competing claims of state, national and international interests. . . In rejecting abdication of all responsibility by this court for uniformities in marine insurance and its complete surrender to the States, one is not required to embrace another absolute, complete absorption by this court in the field of marine insurance and the entire exclusion of the States."

The decision of the Appellate Court in the case at hand firmly rests upon principles not only set forth in the majority opinion but further exemplifies the principles as set forth in the concurring opinion by Justice Frankfurter. This line of reasoning was followed in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). In that case the court stated that "Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the State and the National government in the regulation of maritime

commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the states a wide scope. . . State rules for the petition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of a warranty under contracts of marine insurance — all these laws and others have been accepted as rules of decision in admiralty cases, even at times, when they conflicted with the rule of maritime law which did not require uniformity. . . The state and federal governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history. This sharing of competence in one respect of our federalism has been traditionally embodied in the savings clause of the Act of 1789." There is nothing cited in *Wilburn* that should lead the Petitioner to believe that the case was intended to be narrowly applied to statutory regulation of insurance companies dealing with the public. In fact, the Court in *Wilburn* stated that "the vast amount of insurance litigation in State courts throughout our history also bears witness that until recently state legislators in state courts have treated marine insurance as controlled by state law to the same extent as all other insurance." There is nothing here to indicate that the Court considered that their decision was limited to statutory regulation.

In the *Kossick* case, *supra*, the Court was faced with the question of the propriety of a dismissal before trial of a cause of action in a seaman's diversity complaint,

said dismissal being based on the grounds that the allegations of the complaint were deficient by reasons of the New York Statute of Frauds. The Court stated that the case was brought before the Court because it presented novel questions as to the interplay of state and maritime law in that there was an established rule that oral contracts are generally regarded as valid by maritime law. The two questions before the Court were (1) whether the alleged contract was a maritime contract and (2) if so, was it nevertheless of such a local nature that its validity should be judged by state law. The Appellate Court had held that the contract sued upon was not a maritime contract since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service Personnel, on land, in the course of medical treatment. The court held that this was too narrow a view in that the consideration for the promise was a good forbearance to press what he considered the full extent of his maritime right to maintenance and care. The court stated that "so viewed, we think that the alleged agreement was sufficiently related to *peculiarly* maritime concerns as not to put it, without more, beyond the pale of admiralty law." It is that particular portion of the decision that distinguishes this case from the case at hand. Here we are dealing with the peculiarly maritime right of a seaman, i.e. maintenance and care, which has been historically provided for and governed by federal maritime law. The court went on to say that "considering that sailors of any nationality may join in a ship in any port, and that it is the clear duty of the ship to put into the first available port if this be necessary

to provide prompt and adequate maintenance and care to a seaman who falls ill during the voyage, it seems to us that this is such a contract as may well have been made anywhere in the world, and that the validity should be judged by one law wherever it is made. On the other hand we are hard put to perceive how this contract was *peculiarly a matter of state and local concern.*" This case is easily distinguished from the *Wilburn* case in that historically the area of maintenance and care has been controlled by federal legislation and decisions of Federal courts. However, as pointed out in *Wilburn,* marine insurance has been historically governed by the states. Here we have an individual who is putting into various ports around the country and requesting entrance into a federal institution, a Public Health Service Hospital, and not an individual who is making application for an insurance policy regulated by the state, through a broker in the state where the boat is docked for personal use. This case is certainly not in conflict with the *Wilburn* case as the court in *Kossick, supra,* stated "the application of state law in that case *(Wilburn)* was justified by the court on the basis of a lack of any provision of maritime law governing *the matter there presented.*" There was in the *Kossick* case, *supra,* a strong dissenting opinion by Justice Frankfurter. He stated that "the notion that if such a limited and essential local transaction as the contract here in issue were allowed to be governed by local statute of frauds it would disturb uniformity of maritime law is, I respectfully submit, too abstract and doctrinaire a view of the true demands of maritime law." The Appellate

Court in the case at hand has correctly followed the principles set forth in the *Wilburn* opinion.

In *Gulfstream Cargo Ltd. v. Reliance Insurance Company,* 409 F.2d 974 (5th Cir. 1969), the Court had no trouble in following the guidelines set forth under *Wilburn.* The following cases indicate that the various circuits have continued to follow guidelines set forth in *Wilburn* and that there is no conflict existing between them: *Purofied Down Products Corp. v. Travelers Fire Insurance Co.,* 278 F.2d 439 (2nd Cir., 1960); *A/SJ Ludwig etc. v. Commercial Stevedoring Co.,* 256 F.2d 227 (2nd Cir. 1958); *Grow v. Steel Gas Screw etc.,* 310 F.2d 547 (6th Cir. 1962); *Bell v. Tug Shrike,* 332 F.2d 330 (4th Cir. 1964).

In the *Purofied Down Products,* case, *supra,* the Court stated in footnote one that "We read Wilburn Boat Co. (case) . . . to require us to apply state law in the area of marine insurance unless there is a well-established federal admiralty rule which governs the *particular* problem before the Court." This reasoning hits the nail on the head. The Appellate Court correctly applied the case of *Egan v. Washington General Insurance Corp., supra,* because there was no well-established federal admiralty rule dealing with this particular problem, i.e. corrosion, joinder of dissimilar metals, and therefore they applied Florida decisional law which was right on point.

Yet the Petition suggests that the Fifth Circuit in this case overlooked the decision of *(The Sea Pak), Tropical Marine Products v. Birmingham Fire Insur-*

ance Co., 247 F.2d 116 (5th Cir. 1957) and *(The West Kyska), Waterman SS Corp. v. U.S. Smelting, etc.*, 155 F.2d 687 (5th Cir. 1946) *cert denied*, 329 U.S. 761 (1946). In the *Sea Pak* case the Court found that there was "no explanation as to what caused the leak which resulted in the loss of the vessel." The Court applied the presumption that the defect must have been latent since it was not discoverable prior to departure for sea. This is certainly not a case which is in any way similar to the circumstances of the case at hand. Furthermore, in the *West Kyska* case, *supra*, the Court held that the owner of the ship had failed to establish a latent defect. In fact, the Court stated that a "true latent defect is a flaw in the metal and is not caused by the use of the metallic object." A similar holding can be found in *Mattson v. Connecticut Fire Insurance Co.*, 80 F. Supp. 101 (D. Minn. 1948). Again these are not similar circumstances to the case at hand and the Court of Appeals did not vary from the general principles set forth in both the *Sea Pak* case and the *West Kyska* case. Though these cases provide some guidelines as to the interpretation of the term "latent defect", they certainly are not on point and the Court of Appeals therefore correctly applied the *Egan* case which dealt with almost identical circumstances.

B. The Inchmaree Clause Of Marine Insurance Policies Has Not Been Subjected To Varying Interpretations Especially Under Federal And Florida Case Law.

There is little conflict in the minds of both parties as to what caused the damage to the vessel, i.e. the

separation of the steel elbow from the brass strainer allowing water to enter the hull. Further, there is little disagreement as to the cause of the separation, that being corrosion of the steel elbow causing it to separate from the brass strainer. Experts for both parties agree that this corrosion was caused by the joining of dissimilar metals in the presence of air and salt water resulting in a process called electrolysis and/or corrosion of the steel elbow. The Appellate Court has found that this did not constitute a latent defect and their decision is in accordance not only with Florida decisional law as cited in their decision, but is also supported by Federal cases throughout the various Circuits. The statement by the Petitioner that the insured probably would have gotten a more satisfactory result in another jurisdiction is not supported by statute or by decisions both in the Federal Courts and the Courts of Florida.

It is agreed that both Florida and Federal cases appear to be uniform in holding that the test to determine latency is the ability to discover the defect by reasonable, prudent, and customary inspections. However, the term "latent" refers to specific type of defects and not all defects which go undiscovered. The Petitioner has cited the case of *Tropical Marine Products v. Birmingham Fire Insurance Company, (Sea Pak), supra*, as providing a definition of the term "latent defect." The Court in that case cited various definitions of latent defect and included the definition from *Ferrante v. Detroit Fire and Marine Insurance Co.*, 125 F. Supp. 621 (S.D. Cal. 1954) which stated "a latent defect is a hidden defect and generally involves the

material out of which the thing is constructed as distinguished from the results of wear and tear." In the *Ernest Construction Co. v. The Tug Commodore*, 294 F. Supp. 15 (S.D. Ala. 1968), the cause of the loss was a leak in an oil line hidden under a fixed cuppling. The court held in this case that something more than mere failure must be shown to establish a latent defect. In *The Bill*, 145 F.2d 70 (4th Cir. 1944), the Court stated that the defect in the bilge pipe was not due to any flaw in the metal, but was due to the corrosive effect of foreign substances resulting from the use of the ship. The Court held this was not a latent defect. The case of *Saskatchewan Gov't Ins. Office v. Spot Pack, Inc.*, 242 F. 2d 385 (5th Cir. 1957) had nothing to do with latent defects and the Court was mainly concerned with the defense of "want of due diligence."

The Petitioner finds the case of *The Esso Manhattan*, 1953 AMC 1152 (S.D.N.Y.) analogous to this case. This case is easily distinguishable in that the defective welding in the deck plate was a defect in the material itself or process itself and not, as in the case at hand, a result of wear and tear and other outside forces such as electrolysis.

The Petitioner has also cited the case of *Larson v. Insurance Company of North America*, 362 F.2d 261 (9th Cir. 1966), affirming the District Court decision at 252 F. Supp. 458 (W.D. Wash. 1965), in which case a loss resulted from the sea suction pipe which broke by gradual action of sea water, electrolysis and corrosion. The District Court stated with regard to a latent defect that previous decisions, "have confined the term

to a defect inherent in the metal itself or in the original basic material of which the part concerned is defective and latent in the sense that the defect is not one which could be discoverable by any feasible test, even with the exercise of due diligence. An example, of course, would be a basic weakness in the portion of the steel of the hull; or presumably, in a wooden vessel, in the lumber of the hull, as distinguished from a weakness which did not exist originally in the metal from which the vessel or part was constructed, but which became weakened by chemical and/or electrolytic action or other wear and tear. . . There is no evidence available or offered which would show that the breaking off of the suction pipe was due to any sudden action of wind and/or wave which caused it suddenly to collapse from any unusual strain imposed on a part weak from any inherent or other defect in the metal, but rather the only evidence expected to be adduced would indicate that the weakness in the pipe was caused by gradual action of the sea water, electrolysis, galvanic action of corrosion over a substantial period of time — from *several months* to several years — similar to other processes of wear and tear." That case, cited by the Petitioner, emphasizes the fact that a latent defect involves the material itself and not the joinder of materials resulting in electrolytic action and wear and tear.

The case from Louisiana cited by the Petitioner, *National Sugar Refining Co. v. The Motorship Las Villas*, 225 F. Supp. 686, (E.D. La. 1964), involved a part bilge suction valve which was defective when turned off, allowing water to flow from the sea through the valve

and into the bilge. The reason for the defect was that the valve stem, stopper, and guide had been improperly fitted. This Court found that this condition constituted a latent defect and rightly so. Here we have an inherent defect in the product itself which led to the loss. We do not have a loss caused by the effect of outside forces upon the product which we do have in the case at hand. This factor distinguishes this case and emphasizes once again the correctness of the reasoning of the Court of Appeals in following the *Egan* case, *supra*.

The Petitioner suggests that even the Florida cases are in conflict. The case of *Continental Insurance Company v. Levinson*, 224 So.2d 445 (3 DCA Fla 1969) involved the sinking of the insured's vessel while moored at its dockage. The insured predicated his cause of action upon the Inchmaree Clause and his theory was that the particular latent defect which caused the boat to sink was a defective exhaust hose in the six month old vessel which had broken allowing water to fill and sink the ship. This defect was a breaking of the hose, not a joinder of metals or a result of wear and tear. The Petitioner contends that this case is in direct conflict with the case of *Egan v. Washington General Insurance Corp.*, 240 So.2d 875 (4 DCA Fla 1970). These two cases can certainly be distinguished as the Levinson case involved the breaking of an exhaust hose within a short period of time and involved only the material of the hose itself. The *Egan* case involved a thru bolt in the sea strainer that corroded over a ten month period causing the sea strainer to malfunction resulting in the sinking of the vessel. The latter case is ex-

actly the situation we have in the case at hand and a defect under those circumstances has not been defined as a latent defect by either the Florida courts or the federal courts. The case at hand and the *Egan* case, involved, not failures in the material itself, but rather a failure due to wear and tear through the electrolytic process. However, the *Levinson* case involved the defect in the material itself which is the classical latent defect theory.

In *Reliance Insurance Co. v. Brickenkamp*, 147 So.2d 200 (2 DCA Fla 1962), the court found that the rubber hoses between the exhaust elbows and the pipes going out of the transom were burned in half allowing water to enter the hull. The court found that the holes in the rubber hoses caused by loss of cooling water circulation to the engine resulted from a water pump failue which in turn resulted from a dry belt slipping. The dry belt was found to have slipped because of the maladjustment of the generator which draws the belt tight over the water pump. The question before the court in this case was whether the cause of the loss was a latent defect in machinery or hull which is the same situation presented to this Court. The Court cited the *Waterman* case, *supra*, where the Court had held that a true defect is not a gradual deterioration but is a defect in the metal. The Court held in this case that the defect was not latent.

In the *Egan* case, the yacht sank at dock because of the default in the sea strainer assembly caused by corrosion of a bolt which should have been of a different type material. Furthermore, the only de-

fect mentioned by the surveyor was that it did not have the ability to risk corrosion and rust under these particular circumstances. The Court stated that based upon that testimony, it appeared that the main thrust of the Plaintiff's argument turned on the proposition that the bolt in question consituted a latent defect because it corroded more quickly than would a bolt composed of different alloy. The Court stated that with that proposition they could not agree. The Court specifically stated that "latent defects refer to some structural weakness in the part or component which is responsible for the damage." The Appellate Court in the case at hand has correctly applied the principles and the findings of the *Egan* case to the case at hand in finding that this was not a latent defect. Based upon a review of the federal decisions as well as the law of the State of Florida, there appear to be uniform interpretations in the area of marine insurance contracts throughout the country.

C. The Court Of Appeals Was Correct In Remanding This Case With Directions To Dismiss The Complaint Since There Were No Issues Reserved By The District Court Nor Were There Any Other Issues Raised By The Petitioner On Appeal.

Subsequent to the entry of that final judgment which was filed on May 13, 1971, no motion was made by the Appellant pursuant to Rule 52(b) of the Federal Rules of Civil Procedure to amend the findings of the Court or make additional findings and amend the judgment accordingly. Nor was there a Notice of Appeal or Cross

Appeal filed by the Petitioner pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure (28 USCA) within the time limit provided from the date of filing of the Final Judgment or from the date of the filing of the Notice of Appeal by the Appellant, Respondent herein. By failing to file a Motion for Additional Findings or a Notice of Appeal, the Petitioner failed to timely raise the issue of estoppel for consideration by the Appellate Court. Petitioner even cites 28 U.S.C. Sec. 2106 which states:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court *lawfully brought before it for review*, and may remand the cause and direct the entry of such approach judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances."

Yet neither the issue of estoppel nor the issue of the court's failure to make any finding with regard to the issue of estoppel was brought before the Court of Appeals for review. The Appellate Court, after reversing the decision of the Trial Court with regard to the issue of latent defect, correctly remanded the case to the District Court with instructions to dismiss the Complaint because that was the only issue preserved in the record on appeal.

The Petitioner did mention in his brief to the Appellate Court the issue of estoppel, but the Petitioner

did not raise this issue on appeal. The only issues before the Appellate Court were the determination of whether the loss was caused by a latent defect and whether the loss resulted from want of due diligence by the owner. Upon receipt of Petitioner's brief in the Appellate Court, the Respondent filed a motion to strike that portion of his brief dealing with the issue of estoppel.

In the case of *Wallace v. Fisk, et al.*, 115 F.2d 1003 (8th Cir. 1940), *cert. denied*, 314 U.S. 710, *rehearing denied*, 315 U.S. 829, the issue before the Court was whether the granting of a Motion to Dismiss was proper under the Rules of Federal Procedure. In this case, Judgment was entered on March 30, 1940 and the Notice of Appeal therefrom was not filed until July 29, 1940, after more than the statutory ninety days having lapsed. (90 days was the statutory time limit). Although the Plaintiff in this case had filed a motion to amend the conclusions of law and the judgment in his favor, the Court stated that this did not operate to retain the case and jurisdiction of the District Court to extend the time for appeal to the Plaintiff. This, of course, is not applicable in the case at hand. But the court went on to say that "after the judgment Defendants had appealed, he (the Plaintiff) had the right to cross appeal or to file his motion (within time) in the trial court and within time limited by statute for appeal from the judgment apply to this court to remand the case for consideration of his motion to modify." Most importantly, the court stated that "the difficulty here is that the trial court had, by the taking

of the appeal, lost jurisdiction to consider and determine the motion before the motion was filed."

The above case points out clearly that the time limits as set forth in the Federal Rules of Civil Procedure and the Appellate Rules of Civil Procedure must be met by the various parties and that the issues must be presented on appeal. The Petitioner argues that "procedural guidelines seem to be confusing when the trial judge reserves rulings in non-jury trials as to the requirement that all issues be determined, and this technical matter apparently should be clarified." Nowhere in the transcript and the findings of the court did the court make any statement that it was reserving any ruling or judgment. I quote court as follows: "No, I am going to state in the record that the court is not making any finding on the question of estoppel, and my reason for that is I do not feel it is necessary to go to that theory, which has been presented by the plaintiff, and I want the record to affirmatively show that I am making no finding either way on that because I don't believe in making unnecessary findings." (P. 4 of Appendix A of Petitioner's brief). Nowhere in that statement of the Court is there any reservation by the Court with regard to the issue of estoppel. In fact, an appeal from a final order of the District Court terminates the District Court's jurisdiction to making findings of facts and conclusions of law required by Rule 52. *Aluminum Co. of America,* 2 FDR 224 (D.C. New York 1941)

Contrary to the Petitioner's brief, the Federal Rules and the Appellate Rules are crystal clear as to the

procedures that must be followed with regard to the various motions that were available to the Petitioner under Rule 52 of the Federal Rules of Civil Procedure and Rules 3 and 4 of the Federal Appellate Rules. By not pursuing his relief under those rules, the Petitioner chose to rely on the Trial Court's final judgment in his favor based solely upon the issues of latent defect and failure to use due diligence. The Appellate Court therefore had no jurisdiction to remand the case for further findings.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the foregoing Brief of Respondent was furnished, by mail, to G. E. HARTWIG, Attorney for Petitioner, 220 Southeast 12th Street, Fort Lauderdale, Florida, and to ARTHUR ROTH and CHARLOTTE J. BARKAN ROTH, Attorneys for Petitioner, 1111 Ainsley Building, 14 Northeast 1st Avenue, Miami, Florida, this ____ day of ____, 1972.

GERALD M. WALSH